

No. 76-586



In the Supreme Court of the United States

OCTOBER TERM, 1976

TOMMY JOE COPLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 541 F. 2d 211.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1976. A petition for rehearing was denied on September 17, 1976 (Pet. App. 1b-2b). The petition for a writ of certiorari was not filed until October 27, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.¹ The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The court of appeals entered an order staying the issuance of its mandate (Pet. 2). That order did not, however, extend the time within which to file a petition for a writ of certiorari, which runs

QUESTIONS PRESENTED

1. Whether law enforcement officers must obtain a warrant before using a flashlight to illuminate the interior of an airplane, the windows of which are exposed to common view.

2. Whether the evidence was sufficient to support the conviction.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to import and to possess approximately 500 pounds of marijuana, in violation of 21 U.S.C. 846 and 963; of unlawful importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1) and (b); and of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b).² He was sentenced to concurrent terms of five years' imprisonment, to be followed by three years' special parole, and was fined a total of \$1,500. The court of appeals affirmed (Pet. App. 1a-10a).

The facts are recounted by the court of appeals (Pet. App. 2a-4a). Federal agents, their suspicions aroused by a prior discovery of marijuana debris in petitioner's airplane, observed Henry Valenzuela drive petitioner to Freeway Airport, in Tucson, Arizona, where petitioner entered his plane and (followed by an agent) flew to Caborca, Mexico, an area known to Customs agents as a frequent rendezvous point for drug traffickers (I Tr.

from the date of judgment or of the denial of a timely petition for rehearing. *Department of Banking v. Pink*, 317 U.S. 264, 266; *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548, 551-552.

²Henry Valentin Valenzuela and John Balmer McKittrick were convicted of conspiracy and possession. They were not charged with importation.

85-86).³ Although he was aloft after dark, petitioner did not activate the aircraft's navigation lights (I Tr. 86-87). As petitioner's plane began to descend in Mexico, the agent following him observed flashing automobile lights on the ground below, signifying a place where the plane could land (I Tr. 88).

In the meantime, Valenzuela had driven to a restaurant, where he met John McKittrick. Valenzuela and McKittrick drove separate camper vehicles to Silver Bell Estates, Arizona, known to the agents as a place used by narcotics dealers (I Tr. 110). The campers faced each other from a distance with their headlights illuminating a dry lake bed. The agents observed a plane fly in at a low altitude between the two campers.⁴ Shortly thereafter the campers extinguished their headlights and drove away in the direction of Phoenix.

While ground surveillance agents followed the campers, aerial surveillance agents flew to Sky Harbor Airport in Phoenix. They found that petitioner's aircraft had returned from Mexico without clearing Customs. The engine of the plane was still warm (II Tr. 162). With the aid of a flashlight, an agent looked through a window of the plane and saw marijuana debris. The agents relayed this information to the ground units, who then stopped the two campers; they found 500 pounds of marijuana in the McKittrick camper. After they were unable to locate petitioner, the agents entered the locked airplane and seized the marijuana debris. The debris and the 500 pounds of marijuana were introduced in evidence at trial (II Tr. 162, 198, 283).

³"I Tr." through "III Tr." designate the transcripts of trial.

⁴The agents were able to identify the engine of the airplane as reciprocating; petitioner's plane also had a reciprocating engine (II Tr. 150, 215-216).

ARGUMENT

I. Petitioner contends that both the visual inspection of the interior of his plane and the entry into the plane without a warrant violated the Fourth Amendment.

The act of the agent in looking through the window of the plane was not a "search." Visual observation by a law enforcement officer situated in a place where he has a right to be does not require prior judicial approval. *United States v. Santana*, No. 75-19, decided June 24, 1976; *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861; *United States v. Lee*, 274 U.S. 559; *United States v. Hood*, 493 F. 2d 677, 680 (C.A. 9); *United States v. Conner*, 478 F. 2d 1320, 1323 (C.A. 7); *Williams v. United States*, 404 F. 2d 493, 494 (C.A. 5). The Fourth Amendment does not protect what a person knowingly exposes to public view. *Katz v. United States*, 389 U.S. 347, 351-352. Moreover, the use of a flashlight to illuminate a dark area does not change this analysis, as the Court held in *Lee*.⁵ Rather, the court of appeals properly concluded (Pet. App. 6a):

The fact that the officer was forced to use a flashlight is immaterial. Being dark outside, it was necessary to employ such a device. Rather, if privacy were desired here, Coplen should have closed off the window from public view. By failing to do so, thus

⁵Petitioner asserts that the discovery of the marijuana debris was impermissible because it was not "inadvertent" (Pet. 16). Although the United States does not believe that "inadvertence" is a necessary component of the "plain view" exception to the warrant requirement, the existence of such a component would not help petitioner because we do not rely on the "plain view" rule. We rely, instead, on the rule that what is not closed against public inspection is not the subject of Fourth Amendment protection—a rule that upheld the law enforcement activity in *Santana*, *Western Alfalfa*, and similar cases in the absence of any "inadvertence."

permitting the agent by mere observation to view the marijuana debris, there was no reasonable expectation of privacy insofar as looking into windows is concerned.

Once the agents had discovered that the airplane contained marijuana debris, they were entitled to seize the plane for forfeiture (21 U.S.C. 881(a)(4)) and thereafter to search the plane in their possession without a warrant. See *Cooper v. California*, 386 U.S. 58; *G.M. Leasing Corp. v. United States*, No. 75-235, decided January 12, 1977, slip op. 12-13.

The seizure and search of the airplane was supported by at least two other rationales as well. Airplanes are constitutionally indistinguishable from motor vehicles, which may be seized without warrants. The seizure was justified by exigent circumstances; aircraft are highly mobile, and petitioner might have returned and flown off. Cf. *Cady v. Dombrowski*, 413 U.S. 433, 441-442. Once the plane had been seized for this reason, the officers were entitled to conduct a search because they had probable cause to believe that it contained evidence of crime.⁶ *Chambers v. Maroney*, 399 U.S. 42, 46-52; *Texas v. White*, 423 U.S. 67. Moreover, the agents were entitled to search the plane whether or not there was probable cause to believe that it contained evidence of crime. The agents had probable cause to believe that the plane had just entered the United States without clearing Customs;

⁶Petitioner mistakenly relies on *Coolidge v. New Hampshire*, 403 U.S. 443, for the proposition that searches of vehicles require warrants. The search in *Coolidge* took place in the driveway of the owner's private residence. Searches or seizures of vehicles in other places present quite different problems, as *Texas v. White*, *supra*, and *G.M. Leasing*, *supra*, demonstrate.

they therefore were entitled to subject it to a border search. See 19 U.S.C. 1459 and 1460; *Carroll v. United States*, 267 U.S. 132, 154.

2. Petitioner contends (Pet. 16-20) that the evidence was insufficient to support his convictions. Both lower courts properly rejected this contention. Petitioner was driven to the Freeway Airport by Valenzuela. Petitioner then flew into Mexico without activating his navigation lights and was observed descending to a makeshift landing strip in an area known to officials to be a meeting point for narcotics smugglers. Thereafter, a plane with an engine similar to that of petitioner's landed in Arizona and unloaded a cargo of 500 pounds of marijuana, which McKittrick and Valenzuela retrieved. A short while later, petitioner's airplane was observed on the ground at a Phoenix airport, its engine still warm. Marijuana debris was inside. This evidence was more than sufficient to establish petitioner's participation in the crimes.⁷

⁷ Petitioner argues (Pet. 17) that the court of appeals incorrectly relied on evidence not in the record, namely, that he had flown to Mexico without filing the required flight plan. Even if petitioner is correct that no evidence was introduced to show the existence of such a requirement or of petitioner's non-compliance with it (see I Tr. 89; III Tr. 425), the evidence recited above remains ample to support the conviction.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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